Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

GILFORD PARTNERS,
Petitioner,

vs.

RICHARD PIZITZ et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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37 pp

QUESTION PRESENTED FOR REVIEW

Whether the Alabama courts' exercise of personal jurisdiction over non-resident Gilford Partners violated the Due Process Clause where jurisdiction was predicated solely upon the legal fiction that Gilford Partners' sale of a security, which in fact occurred in Illinois, was statutorily "deemed" to have occurred in Alabama.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Petitioner, Gilford Partners, in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, certifies that the following parties have an interest in the outcome of this case.

1. The Honorable Arthur J. Hanes, Jr., Judge, the Circuit Court of Jefferson County, Alabama.
2. Gilford Partners, Petitioner.
3. Holmes-Gilbrooke General Partners, H. Robert Holmes, and Gilbrooke Associates, Inc.
4. Larry B. Childs, attorney with the firm of Walston, Stabler, Wells, Anderson & Bains, for Petitioner, Gilford Partners.
5. Samuel M. Hill, attorney with the firm of Walston, Stabler, Wells, Anderson & Bains, for Petitioner, Gilford Partners.
6. Richard Pizitz, Respondent.
7. Richard Pizitz, Jr., Respondent.
8. Merritt L. Pizitz, Respondent.
9. Jill Pizitz, Respondent.
10. Susan Pizitz Bosshard, Respondent.
11. Lee H. Zell, attorney with the firm of Berkowitz, Lefkovits, Isom & Kushner, for Respondents, Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard.
12. Susan S. Wagner, attorney with the firm of Berkowitz, Lefkovits, Isom & Kushner, for Respondents, Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard.

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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

GILFORD PARTNERS,

Petitioner,

vs.

RICHARD PIZITZ et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Gilford Partners, an Illinois limited partnership ("Gilford"), prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is Appendix A to this petition. The decision of the Circuit Court of Jefferson County is Appendix B.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on November 5, 1993. The Alabama Supreme Court denied rehearing on December 10, 1993. This petition for certiorari was timely filed and this Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The Code of Alabama § 8-6-12(c) and (d) (1975) provides in part:

§ 8-6-12. Registration of securities — Applicability of provisions of article; consent to service of process on secretary of state.

(c) An offer to sell or buy is made in this state, whether or not either party is then present in this state, when the offer;

(1) originates from this state, or

(2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer).

(d) An offer to buy or sell is accepted in this state when acceptance

(1) is communicated to the offeror in this state, and

(2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing

the offeror to be in this state and it is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance).

* * *

Alabama Rule of Civil Procedure 4.2(a)(2)(C) provides:

RULE 4.2 PROCESS: BASIS FOR AND METHODS OF OUT-OF-STATE SERVICE.

(a) Basis for Out-of-state Service.

(2) Sufficient Contacts. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's

(C) causing tortious injury or damage by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, aircraft, boat or water-craft in this state.

* * *

INTRODUCTION AND STATEMENT OF THE CASE

The Alabama courts asserted jurisdiction over non-resident Gilford based purely on a legal fiction. The trial court and the Supreme Court of Alabama, construing § 8-6-12 ALA. CODE (1975), held that a security, which was actually sold in Illinois, was "deemed" to have been sold in Alabama. The courts below reasoned that the Alabama long-arm statute[1] reached Gilford, because in selling an unregistered security

[1] *See*, Rule 4.2(a)(2)(C) Ala.R.Civ.P.

Gilford "cause[d] tortious injury," which "under §§ 8-6-11 and 8-6-12 occurred in Alabama." (Appendix A at A-4.)[2]

This action began when the Pizitz Family Investment Partnership IX ("Pizitz Partnership") filed suit in the Circuit Court of Jefferson County, Alabama, alleging that Gilford had violated the Alabama Securities Act. The members of the Pizitz Partnership were residents of Alabama, California and Alaska. Gilford raised the personal jurisdiction issue in a motion to dismiss filed on December 2, 1991. Gilford argued in the motion to dismiss that the assertion of jurisdiction would violate due process. The trial court denied the motion to dismiss and the state supreme court affirmed.

In order to assert jurisdiction, the Alabama courts were forced to rely on Gilford's fictional minimal contacts with the forum. The record demonstrates that Gilford did not advertise or solicit business in the forum, maintain property or bank accounts, employ personnel or agents, or sell goods or services in the forum. (*See* Affidavit of Mitchell P. Kopin filed with Motion to Dismiss, ¶¶ 7-15; hereafter "Kopin Aff.") It is undisputed that Gilford did not solicit the sale involved in this action. (*See* Affidavit of Robert Holmes filed with Motion to Dismiss, ¶¶ 6-13; hereafter "Holmes Aff.") The Pizitz Partnership initially contacted Gilford requesting information and a subscription agreement. (Holmes Aff., ¶ 6.) Gilford provided the requested materials and later accepted the Pizitz Partnership's completed subscription agreement in Chicago, executed it in Chicago and returned a copy to the

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[2] Section 8-6-12(c) provides that an offer to buy or sell securities is *made* "in this state, whether or not either party is then present in this state, when the offer (1) originates from this state, or (2) is directed by the offeror to this state." Section 8-6-12(d) provides that an offer to buy or sell securities is *accepted* "in this state when acceptance (1) is communicated to the offeror in this state, and (2) has not been previously communicated to the offeror outside this state." Because Gilford forwarded a copy of an accepted subscription agreement to the Pizitz Partnership in Alabama, the Court held, pursuant to the statute, that the sale was "*deemed* to have occurred in Alabama." (Appendix A at A-4.)

Pizitz Partnership. *Id.*[3] In fact, Gilford's "deemed" contact with the forum was caused by the Pizitz Partnership seeking to purchase the security at issue in this case. (*See* Holmes Aff., ¶¶ 6-13.)

The Alabama Supreme Court denied Gilford's timely application for rehearing on December 10, 1993.

REASONS FOR GRANTING THE WRIT

The decision below merits this Court's review because Alabama's assertion of jurisdiction over Gilford based solely upon a statutorily "deemed" presence of Gilford in the forum violates due process. By expanding jurisdiction by means of a legal fiction, the Alabama courts have disrupted the certainty established by this Court's explanation of due process and have destroyed uniformity in the application of the due process clause in the several states. The Alabama court's precedent in this case creates a serious challenge to the fundamental principle that the Constitutional rights of non-resident defendants must remain uniform from state to state.

I. ALABAMA'S EXERCISE OF PERSONAL JURISDICTION OVER GILFORD CANNOT CONSTITUTIONALLY BE PREDICATED ON A FICTIONAL SALE OF A SINGLE SECURITY IN THE FORUM.

Since *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), "the 'Constitutional touchstone' to determine whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts in the forum state.'" *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92

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[3] Under common law principles, the sale to the Pizitz Partnership occurred in Illinois. *J. R. Watkins Co.* v. *Hill*, 108 So. 244 (Ala. 1926); *Genesco Emp. Credit Association* v. *Cobb*, 411 So. 2d 151 (Ala. Civ. App. 1982); and 17A C.J.S. *Contracts* § 356 (1963). ("[A] contract is considered as entered into at the place where the offer is accepted.")

(1987), *quoting, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Significantly, even if the defendant has purposefully engaged in forum activities, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction. *Burger King*, 471 U.S. at 478, 105 S.Ct. at 2185.[4] In this case, the minimum contacts test is not satisfied by the fiction that the security sale occurred "in this state."[5]

The decision below directly conflicts with the letter and spirit of this Court's decisions.

i.

Jurisdiction is properly asserted if the contacts with the forum "result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 109, 107 S.Ct. 1026, 1030, 94 L.Ed. 2d 92 (1987) (emphasis in original). This substantial connection between the defendant and the forum state "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Asahi* 480 U.S. 112, 107 S.Ct. 1032 (emphasis in original.)

More specifically, this Court has held that the actual execution of an agreement in the forum state, alone, is constitutionally insufficient to support the exercise of personal jurisdiction. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478,

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[4] Fairness in the assertion of jurisdiction is as significant as the necessity that the defendant have at least a minimal tie to the forum. *Hoffman v. United Telecommunications, Inc.*, 575 F. Suppl. 1463, 1469 (D. Kan. 1983) and 2 Moore, *Federal Practice*, ¶ 4.25[5] at 1171-73 (2d ed. 1977).

[5] We also note that the assertion of jurisdiction over Gilford offends traditional notions of fair play and substantial justice. The Alabama courts have referred to no other act by Gilford, apart from the "deemed" sale of a single security, as a predicate to assert jurisdiction. If Alabama is permitted statutorily to create the only act by which jurisdiction is accomplished, the nonresident's liberty interest in not being subject to the binding judgments of a forum with which it has no meaningful "contacts, ties or relations" is emasculated. *Burger King*, 471 U.S. at 471; 105 S.Ct. at 2181.

105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985), this Court unambiguously wrote:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer is clearly that it cannot. (emphasis in original.)

The determination of personal jurisdiction does not turn on the application of mechanical tests; rather, this Court applies a "highly realistic" approach which recognizes that the contract has consequences that must be evaluated to determine if the defendant purposefully established minimum contacts with the forum. 471 U.S. at 479.

The analysis in *Burger King*, suggesting that the mere consummation of an agreement in the forum is insufficient to confer jurisdiction, applies with particular force when the agreement at issue — the defendant's only contact with the state — was actually made outside the forum and is brought within the forum only by operation of a legal fiction. The decision below, by predicating jurisdiction purely on a "deemed" presence, contradicts this Court's holding in *Burger King*.

ii.

This Court has made clear that a state cannot by legislative fiat manufacture the presence of non-resident defendants to satisfy the minimum contacts test. In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977), the defendants, non-resident corporate directors, owned stock which was "deemed" to be located in the forum by operation of a Delaware statute.[6] None of the stock certificates were physically present in the forum. 433 U.S. at 192; 97 S.Ct. at 2573.

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[6]The Delaware statute stated: "for * * * purposes of * * * jurisdiction * * * the situs of the ownership of the capital stock of all corporations existing under the laws of this state * * * shall be regarded as in this state." 433 U.S. at 193, n.9, 97 S.Ct. at 2573 n.9.

Delaware legislated the location of the certificates because sequestration of the property allowed the state to assert *quasi in rem* jurisdiction and force the personal appearance of the owners. *Id.*[7]

The exercise of *quasi in rem* jurisdiction in *Shaffer* was predicated "solely on the statutory presence of appellants' property in Delaware." 433 U.S. at 211, 97 S.Ct. at 2584. This Court held that the *International Shoe* minimum contacts test must be applied to govern "all assertions of state courts' jurisdiction." *Id.* The fictional assignment of the situs of the stock certificates did not satisfy the minimum contacts test.

The Alabama Supreme Court has applied the Alabama Securities Act to achieve the same result created by the Delaware sequestration statute struck down by this Court in *Shaffer*. The fictional presence relied upon by the Alabama courts in this case should also be rejected.

Significantly, the decision below further contravenes this Court's decision in *Shaffer*. The Alabama courts entirely avoided the minimum contacts analysis by mechanically applying the choice of law provisions to establish *jurisdiction*. In *Shaffer*, this Court specifically stated that while it may be appropriate for the forum state's law to govern the obligations of the parties, this does not mean that non-resident defendants have "purposefully availed themselves" of the privilege of conducting business in the forum state so as to permit the exercise of jurisdiction. 433 U.S. at 215-216, 97 S.Ct. at 2586-87. *See also, Hanson v. Denckla*, 357 U.S. 235, 254, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). By relying on choice of law provisions as the predicate for asserting jurisdiction, the Alabama Supreme Court has radically expanded the law of personal jurisdiction.

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[7]The Delaware court pointed out that the purpose of sequestration was not to secure possession of property in dispute between debtors and creditors, rather "sequestration is a process used to compel the personal appearance of a nonresident defendant to answer and defend." 433 U.S at 193; 97 S.Ct. at 2574.

The decision below cannot be reconciled with this Court's decisions requiring minimum contacts between the forum and the non-resident defendant. This Court has specifically directed that lower courts focus upon the conduct of the non-resident defendant to determine if *that defendant* has created a substantial connection with the forum state. The court below did not follow this Court's oft-repeated directions. The court below focused on the conduct of the plaintiff and the legislative conduct of the forum itself. Applying the proper test, it is apparent that Gilford did not purposefully direct activity toward Alabama.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF FEDERAL APPELLATE COURTS AND OTHER STATE COURTS.

Alabama's assertion of jurisdiction over Gilford stands in stark contrast to rulings made in the federal courts of appeal and state appellate courts addressing the same issue. Prior to the decision below, federal and state courts consistently applied the due process clause to require more than a fictional presence to support jurisdiction. The decision below shatters that consistency and predicates jurisdiction on a "deemed" presence. The enjoyment of federal due process rights cannot depend upon the forum in which a non-resident defendant is sued; rather, those rights must be uniformly and consistently upheld in every state.

i.

The decision below conflicts with several decisions from the federal circuit courts. In *Erlanger Mills v. Cohoes Fibre Mills*, 339 F.2d 502, 507 (4th Cir. 1956), the Fourth Circuit held that a North Carolina federal court lacked personal jurisdiction over a New York defendant in a contract performance dispute. A single order for goods was submitted by the North Carolina plaintiff and accepted in New York by the defendant. The New York defendant had not conducted any other business in North Carolina. The Court of Appeals specifically held that the sale, even if tortious, would not support per-

sonal jurisdiction. *See also, Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123, 1139 (3rd Cir. 1976) (Gibbons, J. concurring) ("The question is whether the due process clause is satisfied when a fictional situs is substituted for minimum contacts analysis as a basis for exercising raw judicial power. I think it is plain that due process is not satisfied under such circumstances.") (cited with approval in *Shaffer*, 433 U.S. at 205.)

Similarly, in *Sea Lift, Inc. v. Refinadora Costarricense*, 792 F.2d 989, 993 (11th Cir. 1986), the Eleventh Circuit held that a single meeting between the non-resident defendant's agents in the forum and the signing of a single boilerplate contract in the forum was insufficient to support specific jurisdiction over a breach of contract claim. The court expressly held that the execution of a form contract in the forum was insufficient to confer jurisdiction. The decision below cannot be reconciled with *Sea Lift*. Because Alabama is located within the Eleventh Circuit, identical jurisdictional issues in Alabama could be resolved differently depending upon whether the non-resident defendant is sued in federal or state court.

ii.

The decision below conflicts with other state court decisions addressing the same issue.[8] *See e.g., Gordon v. Tow*, 148 Ill. App. 3d 275, 498 N.E.2d 718 (Ill. App. Ct. 1986). On their facts, *Gordon* and the present case are virtually identical. Tow, a Rhode Island resident, sold a limited partnership interest to Gordon, an Illinois resident. Gordon called Rhode Island to purchase the interest from Tow. Tow did not solicit or communicate with Gordon prior to this call. Tow sent a prospectus and a subscription to Gordon at Gordon's request. Gordon completed the subscription agreement and forwarded it with $20,000 to Tow to purchase the interest.

The Illinois Appellate Court in *Gordon* affirmed the trial court's dismissal of the complaint for lack of personal juris-

[8] The split in state law authorities alone constitutes a valid ground for review by this Court, *St. Martin Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780, n.10 (1981).

diction over non-resident defendant Tow. The court explained that Gordon had initiated the transaction outside of Illinois, the agreement was entered into outside of Illinois, and the contract was to be performed outside of Illinois. As a result, the court concluded that Tow had not conducted any business "within this state." 148 Ill. App. 3d at 278, 498 N.E.2d at 720. Moreover, the court concluded that based on these facts, Tow had not purposely availed himself of the privilege of conducting business in Illinois such that he invoked the benefits and protections of the laws of Illinois.[9] The Illinois Court refused to permit Gordon to "lure the non-resident defendant into Illinois." 148 Ill. App. 3d at 280, 498 N.E.2d at 721.[10]

The decision below cannot be reconciled with *Erlanger Mills*, *Sea Lift*, *Jonnet* or *Gordon*. As a result, the reach of long-arm jurisdiction is broader in Alabama than elsewhere. The *Erlanger Mills* court explained the significance of such a result:

> If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction.

239 F.2d at 509.

The decision below is not merely an erroneous application of law to facts. It is a significant and unjustified expansion of one state's jurisdictional reach. That expansion undermines

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[9] *Gordon* specifically rejected the argument that limited telephone contacts and exchanges of correspondence supported the assertion of jurisdiction. 148 Ill. App. 3d at 283, 498 N.E.2d at 723.

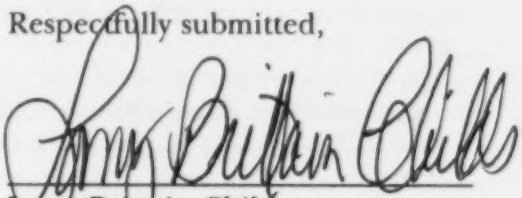
[10] Ironically, the only case cited by the Alabama courts in support of asserting jurisdiction over Gilford was an Illinois federal district court opinion–*Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976). (*See*, App. A at A-3.) The theoretical foundation of *Florendo* has been clearly repudiated by this Court. The *Florendo* court applied a version of the "stream of commerce" test which was decried by the Court in *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987), *See also, Bond v. Octagon Press Inc.*, 745 F. Supp. 710, 713 (M.D. Ga. 1990).

the fabric of due process itself and clouds this Court's persistent efforts to provide clear guidance in this area.

CONCLUSION

The Alabama courts have concluded that the minimum contacts test can be satisfied by a fiction — the statutorily manufactured presence of a securities sale. This fictional presence (through the "deemed" sale of the security in this state) was not based on any action of the non-resident defendant directed to the forum. In order to maintain harmony with this Court's previous jurisprudence and to prevent inconsistent standards of due process from being applied in different states, this Court should reverse the Supreme Court of Alabama's holding. The petition for a writ of certiorari raises substantial issues and should be granted.

Respectfully submitted,



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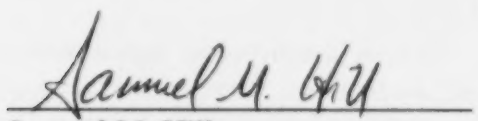

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APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1920604

Gilford Partners, a limited partnership

v.

Richard Pizitz, et al.

Appeal from Jefferson Circuit Court
(CV-91-7641)

INGRAM, JUSTICE.

The plaintiffs — Richard Pizitz, Merritt Pizitz, Jill Pizitz, Richard Pizitz, Jr., and Susan Pizitz Bosshard — sued the defendants — Gilford Partners, H. Robert Holmes, Holmes-Gilford General Partners, and Gilbrooke Associates, Inc. — alleging various violations of the Alabama Securities Act, §§ 8-6-1 through - 33, Ala. Code 1975, arising out of the sale of an unregistered security to the plaintiffs' partnership, Pizitz Family Investment Partnership IX (hereinafter the "Pizitz Partnership").[1] The plaintiffs alleged (1) that the defendants had failed to register the limited partnership interest in Gilford Partners, in violation of § 8-6-4; (2) that Holmes and Holmes-Gilford had failed to register as agent and dealer, respectively, in violation of § 8-6-3; and (3) that the defendants had made misrepresentations and omissions in information sent to the plaintiffs, in violation of § 8-6-17. The plaintiffs also

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[1]The Pizitz Partnership was created for the sole purpose of purchasing and retaining investments on behalf of the individual family member investors.

alleged causes of actions for violation of 15 U.S.C. § 77*l*(2), for common-law fraud, and for breach of fiduciary duty. The defendants moved to dismiss for lack of personal jurisdiction; the plaintiffs responded and moved for a partial summary judgment for statutory damages, under § 8-6-19(a)(1), on the plaintiffs' claim of failure to register the security, in violation of § 8-6-4, and failure to register as an agent and a dealer, in violation of § 8-6-3(a). The trial court denied the motion to dismiss and granted the partial summary judgment as to Gilford Partners only.[2] The partial summary judgment was made pursuant to Rule 54(b), Ala. R. Civ. P.

Gilford Partners appeals, raising two issues: (1) whether the trial court erred in denying the motion to dismiss for lack of personal jurisdiction; and (2) whether the defendants presented substantial evidence that the Pizitz Partnership was an "institutional buyer" under § 8-6-11(8), evidence to defeat the plaintiffs' motion for summary judgment.

Personal Jurisdiction

Gilford argues that the circuit court erred in failing to dismiss for lack of personal jurisdiction. In its order denying Gilford's motion to dismiss, the trial court stated:

> "[The Pizitz Partnership cites] a number of bases for the Court's assertion of personal jurisdiction over Gilford. Because the Court has determined that the sale of the Gilford limited partnership interest without registration was unlawful, only one of these grounds need be considered. As the court concluded in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), nonresident defendants who unlawfully sell unregistered securities in the forum state subject themselves to personal jurisdiction in the state in actions to enforce statutory remedies for such unlawful sales. As is clear from

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[2]The parties agreed for the trial court to reserve ruling on the plaintiffs' motion for a partial summary judgment with respect to the remaining defendants.

> Ala. Code §§ 8-6-2(8) and 8-6-12, Gilford's unlawful 'offer to sell' and acceptance of [the Pizitz Partnership's] 'offer to buy' the security occurred in Alabama."

We affirm the denial of Gilford's motion to dismiss for lack of personal jurisdiction. Rule 4.2, Ala. R. Civ. P., states, "A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's . . . (C) Causing tortious injury or damage by an act or omission in this state. . . ." Section 8-6-12, Ala. Code 1975, provides that the Securities Act of Alabama, §§ 8-6-1 through -33, applies to "persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state." The section further provides that "[a]n offer to sell or to buy is made in this state . . . when the offer (1) originates from this state, or (2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer)." § 8-6-12(c). The statute provides that the offer to buy or sell is *accepted* "when acceptance (1) is communicated to the offeror in this state, and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state . . . when the offeree directs it to the offeror in this state. . . . . " § 8-6-12(d).

The court in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), found that the defendants in that case, who had failed to register the security sold to the plaintiff, "[had] subjected themselves to the jurisdiction of [the Illinois] court. Because the injury . . . took place in Illinois, that state was the situs of the tortious act." 419 F. Supp. at 18. The court further stated that exercising jurisdiction did not offend the "traditional notions of fair play and substantial justice," because the defendants should have foreseen the possibility of being sued in the Illinois forum. *Id.*, at 18-19. The district court held that an action such as that against the defendants was foreseeable because "[the] defendants [had]

sold an interest in a limited partnership to a specifically identified purchaser residing in Illinois." The court added that "[i]t [was] certainly fair under the circumstances to require them to litigate a controversy concerning that sale in Illinois." *Id.*, at 19.

In the present case, Gilford concedes that, under §§ 8-6-11 and 8-6-12, the sale of the security is deemed to have occurred in Alabama. It argues, however, that the statutes create a "legal fiction" that is insufficient to allow the trial court to assert personal jurisdiction over it. We disagree. As stated in *Florendo*, the sale of an unregistered security causes a "tortious injury," and the sale under §§ 8-6-11 and 8-6-12, occurred in Alabama. Therefore, we hold that Gilford had sufficient contacts with this State because it may be legally responsible for "causing tortious injury or damage by [its] act or omission in this state." *See* Ala. R. Civ. P. 4.2(C).

Summary Judgment

"It is unlawful for any person to offer or sell any security in this state unless: (1) It is registered under this article; (2) The security is exempt from registration under section 8-6-10; or (3) The transaction is exempt under § 8-6-11." § 8-6-4, Ala. Code 1975; *see also* § 8-6-11(a) (expressly stating that §§ 8-6-3 through 8-6-9 do not apply to the listed exempt transactions). Gilford argues that the trial court erred in entering the summary judgment in favor of the Pizitz Partnership because, Gilford argues, it had presented substantial evidence that Pizitz Partnership was an "institutional buyer" and, therefore, that the transaction was exempt from the registration requirements under § 8-6-11(8).

The trial court held that, given the beneficent purpose of the blue sky laws,[3] the exemption was to be narrowly construed. *See* 69 Am. Jur. 2d *Securities Regulation-State* § 6 (1973)

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[3]The term "blue sky laws" originated with an early description of the purpose of state security laws as protecting investors against "speculative schemes which have no more basis than so many feet of blue sky." *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

("the general view is . . . that blue sky laws, being enacted for the protection of the public, should be liberally construed to effectuate that purpose"). Section 8-6-11(8) states that a transaction is exempt from §§ 8-6-3 through 8-6-9 of the Alabama Securities Act if it contains

> "[a]ny offer or sale to a bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act or 1940, pension or profit-sharing trust or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity. . . . "

In its order, the trial court interpreted § 8-6-11(8) as follows:

> "The maxim *ejusdem generis* dictates that, '"when general words follow an enumeration of words of a particular and specific meaning, such general words are held to apply only to persons or things of the same kind, as those designated by the particular words . . . "' *Ex parte Capital City Asphalt, Inc.*, 437 So. 2d 1291, 1293-94 (Ala. 1983) (citation omitted). The statutory phrase 'other financial institution or institutional buyer' is immediately preceded by 'bank, savings institution, credit union, trust company, insurance company, or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust.' The term 'institutional buyer' must, therefore, be limited to the same kind of institutional investors as those specifically enumerated and cannot be expanded to include wholly different classes of investors such as the Pizitz Partnership.
>
> ". . . None of the specific institutions enumerated in the statute or comment includes private investors or groups of private investors buying securities for their own accounts. Moreover, none of these specified categories of institutions is qualified, for purpose of application of the exemption, by size, wealth, or sophistication requirements. Therefore, the inclusion of such buyers within the definition of

'institutional buyer' based on wealth and sophistication would violate the doctrine of *ejusdem generis*.

". . . .

"Although the conclusion that investment partnerships such as the Pizitz Partnership are not 'institutional buyers' is compelled both by principles of statutory construction and the mandate that exemptions to the Alabama Securities Act be narrowly construed, the Court is not satisfied that there is any logic to requiring registration of securities sold to partnerships composed of wealthy, sophisticated individuals whose assets and investment experience might exceed that of many small savings institutions or colleges. This incongruity does not dictate a different result, however, since the same argument could be made with respect to wealthy, sophisticated individuals, who would not be exempt, under even the broadest conceivable definition of 'institutional buyer.'"

We agree with the trial court and hold that, as a matter of law, the § 8-6-11(8) exemption for sales to "institutional buyers" does not apply to Gilford's sale to the Pizitz Partnership. There being no genuine issue of material fact, we affirm the summary judgment in favor of the Pizitz Partnership. Rule 56, Ala. R. Civ. P.

AFFIRMED.

Hornsby, C.J., and Almon, Shores, and Steagall, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

RICHARD PIZITZ, RICHARD PIZITZ, JR. MERRITT L. PIZITZ, JILL PIZITZ; and SUSAN PIZITZ BOSSHARD	)	
Plaintiffs,	)	Civil Action No. CV 91-7641
v.	)	
GILFORD PARTNERS, a limited partnership; HOLMES-GILBROOKE GENERAL PARTNERS, a general partnership; H. ROBERT HOLMES; and GILBROOKE ASSOCIATES, INC.,	)	
Defendants.	)	

ORDER

This cause arises upon the following motions:

(a) The motion to dismiss for lack of personal jurisdiction filed by defendants Gilford Partners ("Gilford"), Holmes-Gilbrooke General Partners ("Holmes-Gilbrooke"), H. Robert Holmes ("Holmes"), and Gilbrooke Associates, Inc. ("Gilbrooke"); and

(b) the motion for summary judgment filed by plaintiffs Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard, by which they seek statutory damages pursuant to Ala. Code § 8-6-19 (1984)[1] for (1) defendants' failure to register the limited partnership interest in

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[1] Ala. Code § 8-6-19 provides a private right of action, and sets forth the measure of damages, for violations of §§ 8-6-3 and 8-6-4. That section provides in pertinent part:

Gilford that was sold to plaintiffs, as required by Ala. Code § 8-6-4 (1984), and (2) Holmes' and Holmes-Gilbrooke's failure to register as an agent and dealer, respectively, as required by Ala. Code § 8-6-3 (1984).[2]

Upon consideration of the motions, and of the accompanying affidavits, briefs, and oral argument presented by counsel, the Court concludes that summary judgment is due to be entered in favor of the plaintiffs and against Gilford for Gilford's failure to register the limited partnership interest pursuant to Ala. Code § 8-6-4 (1984). By agreement of the parties, the Court reserves ruling on the motions with respect to the remaining defendants.

Plaintiffs are partners in Pizitz Family Investment Partnership IX, an Alabama general partnership (the "Pizitz Partnership"). Richard Pizitz and Merritt L. Pizitz are brothers, and Richard Pizitz, Jr., Jill Pizitz, and Susan Pizitz Bosshard are children of Richard Pizitz.

The Pizitz Partnership was formed in 1987 for the purpose of investing funds with a money management firm unrelated to any of the defendants. In 1988, the partners became dissatisfied with the money manager's performance and instructed the firm to liquidate its position. The funds were distributed

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(a) Any person who:

(1) Sell or offers to sell a security in violation of any provision of this article . . .

* * *

is liable to the person buying the security from him who may bring an action to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, court costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

[2] The parties have settled the conversion claim set forth in Count Seven of the Amendment to Complaint, as to which plaintiffs also sought summary judgment.

to the individual partners, and the Pizitz Partnership became inactive.

In 1990, the Pizitz Partnership was revived for the purpose of purchasing a limited partnership interest in Gilford. The partnership agreement was amended, and new capital was contributed by the partners for the purpose of this investment. The Gilford limited partnership interest was acquired in May 1990 for a purchase price of $545,880 and liquidated for the sum of $179,320 as of March 31, 1991.

The Gilford limited partnership interest purchased by the Pizitz Partnership constitutes a "security" within the meaning of Ala. Code § 8-6-2. Ala. Code § 8-6-4 makes it unlawful for any person to offer or sell any security in Alabama unless it is registered under the Act or unless the security or sale is exempt from registration. The Gilford limited partnership interest was not, either at the time of its sale to the Pizitz Partnership or at any other time, registered under the Alabama Securities Act.

A. Defendants' Motion to Dismiss

Plaintiffs cite a number of bases for the Court's assertion of personal jurisdiction over Gilford. Because the Court has determined that the sale of the Gilford limited partnership interest without registration was unlawful, only one of these grounds need be considered. As the court concluded in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), nonresident defendants who unlawfully sell unregistered securities in the forum state subject themselves to personal jurisdiction in the state in actions to enforce statutory remedies for such unlawful sales. As is clear from Ala. Code §§ 8-6-2(8) and 8-6-12, Gilford's unlawful "offer to sell" and acceptance of plaintiffs' "offer to buy" the security occurred in Alabama.

B. Plaintiffs' Motion for Summary Judgment

Aside from personal jurisdiction, the only defense asserted to plaintiffs' motion for summary judgment is the transac-

tional exemption set forth in Ala. Code § 8-6-11(a)(8) (1984) for "institutional buyers."[3] Gilford contends that a family partnership formed for the purpose of investing in securities can be an "institutional buyer" if it or its members have sufficient wealth, investment experience, and sophistication not to require the protection of the securities laws. Plaintiffs assert that a partnership of individual investors formed for the purpose of trading in securities for their own account cannot, as a matter of law, be an "institutional buyer," regardless of the wealth, investment experience, or sophistication of the individuals or the partnership.

In granting plaintiffs' motion for a protective order to defer discovery concerning plaintiffs' wealth, investment experience, and sophistication, the Court indicated that, for purposes of the motion for summary judgment, it would assume whatever facts Gilford asked it to assume. Consequently, the Court makes no findings with respect to the extent of the plaintiffs' wealth, investment experience, or sophistication. It is undisputed, however, that the Pizitz Partnership and each of its partners is an "accredited investor" within the meaning of the Section 501 of Regulation D of the Rules and Regulations of the United States Securities and Exchange Commission, 17 C.F.R. § 230.501.[4]

---

[3] Ala. Code § 8-6-11(a)(8) provides in part:

> (a) Except as hereafter in this section expressly provided, sections 8-6-3 through 8-6-9 shall not apply to any of the following transactions:
>
> * * *
>
> (8) Any offer or sale to a bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity.

[4] This section provides in pertinent part:

> (a) *Accredited investor.* "Accredited investor" shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following

The term "institutional buyer" is not defined by statute or regulation, and no Alabama court decisions or administrative rulings have defined the term. The Alabama exemption was modeled after section 402(b)(8) of the 1956 Uniform Securities Act, but the uniform act similarly fails to define "institutional investor."[5] Moreover, there is no case law defining or interpreting the terms "institutional investor" or "institutional buyer" within the meaning of parallel exemptions in other states. In view of the complete absence not only of controlling Alabama authority, but of precedent from other jurisdictions,[6] the meaning of "institutional buyer" must be deter-

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> categories, at the time of the sale of the securities to that person:
>
> * * *
>
> (5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;
>
> (6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess or $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
>
> * * *
>
> (8) Any entity in which all of the equity owners are accredited investors. Although the record is not conclusive as to whether each member of the partnership in fact had sufficient assets or income to qualify as an "accredited investor," Gilford "reasonably believe[d]" that they did, based upon questionnaire responses to that effect provided by Richard Pizitz, the managing partner of the Pizitz Partnership.

[5] The official comment to this section of the 1956 Uniform Securities Act states only the following:

> The term "institutional buyer" is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale. The term may be either left to *ad hoc* interpretation or defined by an interpretative rule. . . .

[6] Gilford's reliance on *Stein v. Twilight Motel, Inc. of Fla.*, 29 Ill. App. 2d 131, 172 N.E.2d 642 (1961), *Brannon v. Rinzler*, Nos. 12219, 12310 (Ohio Ct. App. Oct. 18, 1991) (1991 WL 216403), and *J.J. Enters. v. Hawk Energy Co.*, No. 12589 (Ohio Ct. App. Jan. 28, 1987) (1987 WL 6066), is misplaced. *Stein* was decided on the basis of an Illinois statutory exemption for "any associa-

mined by reference to the purpose of the securities laws and to other applicable rules of statutory construction.

It is well established that blue sky laws should be liberally construed to effectuate their purpose of protecting the public from deceit perpetrated in the sale of securities. *Midwest Management Corp. v. Stephens, supra*, 291 N.W.2d at 901. Conversely, exemptions from registration under such laws are to be narrowly construed. As the Alabama Securities Commission has held:

> The general pattern of the Alabama Securities Act - a sweeping prohibition, subject to a limited number of carefully designed exemptions, considered together with the nature and particularity of the exemptions themselves emphasizes rather than obscures the basic purpose of the Act to protect investors and stresses the generality of its intended application. In this setting, it is clear that the *exemptions must be strictly construed* and that the claimant of an exemption has the burden of showing that he falls within the terms of the exemption he claims. Indeed, Section 48 of Title 53, Code of Alabama 1940, as amended [Section 8-6-30, Code of Alabama, 1975], precludes any other construction.

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tion engaged as a substantial part of its business or operations in purchasing or holding securities." No such exemption has ever been included in the Alabama Securities Act. Moreover, at the time *Stein* was decided, the Illinois statute did not even contain the term "institutional investor" or "institutional buyer." Similarly, although the Ohio statute at issue in *Brannon* and *J.J. Enterprises* provided an exemption from registration for sales to "institutional investors," this term was expressly defined by the statute to include "any association engaged, as a substantial part of its business or operations in purchasing or holding securities." Thus, the issue in *Brannon, J.J. Enterprises*, and *Stein* was simply whether the respective plaintiffs' general partnerships were "associations" within the meaning of the Ohio and Illinois statutes. The Court also is unpersuaded by the ruling of the Kentucky director of the Division of Securities that a family investment partnership can be an institutional investor within the meaning of the Kentucky securities statute. [1971-1978 Transfer Binder] Blue Sky Rep. (CCH ¶ 27,555 (Mar. 7, 1975). The Kentucky securities directors' decision was based upon *Stein* and similar authority which the Court has rejected as inapposite.

> "In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it."

[1971-1978 Transfer Binder] Blue Sky L. Rep. ¶ 7552 (Ala. Sec. Comm'n Aug. 9, 1976) (emphasis supplied) (attached as Exhibit C hereto); *accord Rogers v. Cowley*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,178, [1982-1984 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,831, No. C81-2305A (N.D. Ga. Mar. 14, 1983) (1983 WL 1306).

Although the rationale for exempting sales to certain entities from registration requirements has been stated to be those entities' presumed sophistication, *see Farmers & Merchants Bank v. Hamilton Hotel Partners*, 702 F. Supp. 1417, 1422 (W.D. Ark. 1988), it cannot be said that investment sophistication is, conversely, sufficient to bring a buyer within the exemption. As stated in *Martin v. Orvis Bros. & Co.*, 323 N.E.2d 73 (Ill. App. Ct. 1974):

> In *Reid v. NX Corporation*, 11 Ill. App. 3d 706, 708, 297 N.E.2d 380, this court stated that the purpose of exempting sales from registration when the purchaser is himself a dealer, is that it is assumed dealers, like the other institutional investors enumerated in Section 4, subd. C, are capable of protecting themselves and do not require the protection afforded by the Act. However, *unless the specific words of the exemption provisions require their inclusion, private investors are not denied coverage under the Act merely because they are "sophisticated investors."*

Id. at 81 (emphasis supplied); *accord Midwest Management Corp. v. Stephens*, 291 N.W.2d 896, 905 (Iowa 1980). Even more recently, in *Harrison v. Fulkerson*, 548 N.E.2d 15 (Ill. App. Ct. 1989), the Illinois appellate court held:

> We must note that the decisions of Illinois courts that have interpreted the Act and its exemptions have spoken of "sophisticated investor" exemptions. [Citing *Stein*].

> . . . Use of the word "sophisticated" is a paraphrase of the statute; a paraphrase can lead to the wrong result. *The test is not "sophistication;" rather, the test is the express language contained in the exemption. Investors are not deprived the protection of the Act merely because the are "sophisticated."* [Citing *Martin v. Orvis Bros.*]. *Investors fall outside the protection of the Act only if the Act specifically excludes them.* [Citing *Martin v. Orvis Bros.*].

Id. at 16 (emphasis supplied).

The maxim *ejusdem generis* dictates that, "'When general words follow an enumeration of words of a particular and specific meaning, such general words are held to apply only to persons or things of the same kind, as those designated by the particular words . . . . '" *Ex parte Capital City Asphalt, Inc.*, 437 So. 2d 1291, 1293-94 (Ala. 1983) (citation omitted). The statutory phrase "other financial institution or institutional buyer" is immediately preceded by "bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust." The term "institutional buyer" must, therefore, be limited to the same kind of institutional investors as those specifically enumerated and cannot be expanded to include wholly different classes of investors such as the Pizitz Partnership.

The additional categories suggested by the official comment to the 1956 Uniform Securities Act are of the same type as those specified in the statute:

> The term "institutional buyer" is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale.

None of the specific institutions enumerated in the statute or comment includes private investors or groups of private investors buying securities for their own accounts. Moreover, none of these specified categories of institutions is qualified, for purpose of application of the exemption, by size, wealth, or sophistication requirements. Therefore, the inclusion of

such buyers within the definition of "institutional buyer" based on wealth and sophistication would violate the doctrine of *ejusdem generis*.

In addition to principles of statutory construction, the Court has considered the practical implications of a holding that some investment partnerships might be included within the exemption. The exemption unquestioningly cannot have been intended to apply to all partnerships formed for the purpose of investment, since such an interpretation would include even $10 per week investment clubs. Consequently, if the Court were to hold that purchases of securities by investment partnerships can be exempt under the Alabama Securities Act, some standards would have to be adopted so that ordinary, unsophisticated investors would retain the protections of the Act. Simply instructing a jury that it must determine whether a particular plaintiff is an "institutional investor" would require that the jury interpret the statute, which is not its function. In addition, because one jury might conclude that a $1,000,000 net worth is required, but another might be satisfied with $100,000, submission of the issue to a jury would eliminate any certainly [sic. certainty] in application of the exemption.[7] Moreover, if the Court were to adopt wealth and sophistication standards, such as a minimum net worth or a minimum number or volume of previous trades, it would be undertaking a function properly left to the legislature.

The Court has considered the adopting the federal "accredited investor" standard[8] as a benchmark for application of the "institutional buyer" exemption to investment partner-

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[7] Although the official comment to the 1956 Uniform Securities Act states that "institutional buyer" may be left to "*ad hoc* interpretation," the submission of such an issue to a jury certainly cannot have been intended, any more than the submission to a jury of the question whether colleges in general or any particular college is an "institutional buyer." "*Ad hoc* interpretation" suggests only that, rather than attempting an all inclusive list or definition, the court may simply determine whether the particular type of investor at issue in the case before it is or is not included.

[8] See note 4, *supra*.

ships. This standard is mentioned in the comments to the 1985 Uniform Securities Act and has the advantage not only of ease of application, but of representing the considered judgment of someone other than this Court as to an appropriate bright line test.[9] The Court is persuaded, however, that the Alabama legislature could not have intended the adoption of this standard, since (a) the Alabama exemption statute was not based on the 1985 Uniform Act; (b) the comment to the 1985 Uniform Act does not suggest that "accredited investor" and "institutional investor" are, or should be, synonymous; (c) the recognition in the comment of the "accredited investor" concept, coupled with the drafters' decision to use a different term plainly suggests that some other meaning of "institutional investor" was intended; and (d) the definition of "accredited investor" is a changing standard defined by a regulation the United States Securities and Exchange Commission, as amended from time to time. The Securities and Exchange Commission does not consider the terms to be synonymous; indeed, it designates only those accredited investors listed in Rule 501(a)(1) of Regulation D, not Rule 501(a)(8), as "institutional investors." *See* Release No. 33-6683. 52 Fed. Reg. 3015.01 (proposed January 30, 1987). Moreover, the only authority located on the application of the accredited investor standard to blue sky exemptions is an opinion of the general counsel for the Kansas Securities Commission, which states:

> [Q]ualifications as an accredited investor under Section 2(15) of the Securities Act of 1933 and a net worth in excess of several million dollars would not necessarily qualify that person as an institutional investor under a blue sky exemption such as K.S.A. 17-1262(f).

1991 WL 276173 (Kan. Sec. Comm'n Dec. 5, 1991).

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[9] The comment states:

> The federal securities laws utilize the concept of "accredited investors" which include a variety of corporate and individual investors satisfying financial and other criteria.

Although the conclusion that investment partnerships such as the Pizitz Partnership are not "institutional buyers" is compelled both by principles of statutory construction and the mandate that exemptions to the Alabama Securities Act be narrowly construed, the Court is not satisfied that there is any logic to requiring registration of securities sold to partnerships composed of wealthy, sophisticated individuals whose assets and investment experience might exceed that of many small savings institutions or colleges. This incongruity does not dictate a different result, however, since the same argument could be made with respect to wealthy, sophisticated individuals, who would not be exempt under even the broadest conceivable definition of "institutional buyer." Even more importantly, the Court must recognize that

> The purpose of interpretation is not to improve a statute but rather to explain the express language used in the statute.

Montgomery Bridge & Eng'g, Inc. v. State, 440 So. 2d 1114, 1115, (Ala. Civ. App. 1983).

Because plaintiffs have demonstrated that there is no other genuine issue as to any material fact, they are entitled to summary judgment as a matter of law on their claims against Gilford for damages under Ala. Code § 8-6-19 (1984). The Court further expressly finds that there is no just reason for delay in the entry of final judgment in plaintiffs' favor, pursuant to Ala. R. Civ. P. 54(b). The Court has been advised (a) that upon expiration of the time for appeal or upon affirmance of this order, plaintiffs will dismiss their claims for fraud and breach of fiduciary duty; and (b) that upon payment of this judgment, interest, costs and any attorneys' fees this Court might award, plaintiffs will dismiss their claims against the remaining defendants. Consequently, certification of this order as final may result in a more expeditious resolution of this case.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That a final judgment be, and it hereby is, entered in favor of the plaintiffs an against Gilford in the amount of $428,677.20, including interest through October 31, 1992, together with $723.12 , representing interest for the period from November 1, 1992 through the date of this judgment at the rate of $60.26 per day.

2. That the judgment set forth in paragraph 1 above is a final order under the provisions of Ala. R. Civ. P. 54(b).

3. That plaintiffs are given leave to file an application for attorneys' fees within 30 days after the later of: (a) the expiration of the time for filing a notice of appeal from this order, (b) the dismissal of any appeal from this order, or (c) the issuance of a mandate of the Alabama Supreme Court affirming this order.

4. Costs taxed to defendant.

This the 12 day of November , 1992.

ARTHUR J. HANES
Circuit Judge

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1437

In The

Supreme Court of the United States

October Term, 1993

GILFORD PARTNERS,

Petitioners,

v.

RICHARD PIZITZ, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the courts of Alabama have personal jurisdiction over a nonresident defendant who, through the use of interstate mail and wire communications, (a) knowingly and voluntarily sells an unregistered security in Alabama in violation of state law and (b) in connection with the sale, makes misrepresentations in written materials mailed to Alabama residents.

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STATEMENT OF THE CASE

Respondents, Richard Pizitz ("Pizitz"), Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard, three of whom are Alabama residents, are partners in Pizitz Family Investment Partnership IX, an Alabama general partnership (the "Pizitz Partnership"). In May 1990, the Pizitz Partnership purchased a limited partnership interest in petitioner Gilford Partners ("Gilford") for the sum of $545,880. (Pizitz depo. at 41, R. 40).[1] The limited partnership interest was not, either at the time of its sale to the Pizitz Partnership or at any other time, registered under the Alabama Securities Act. (R. 108). As of March 31, 1991, the interest purchased by the Pizitz Partnership was liquidated for the sum of $179,320.

Respondents filed a complaint against Gilford and others,[2] based on their failure to register the Gilford limited partnership interest in violation of the Alabama Securities Act,[3] misrepresentations and omissions in violation of Ala. Code § 8-6-17 (1984) and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), common law fraud, and breach of fiduciary duty. (R. 1-7). Gilford and

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[1] Record references are to the record on appeal to the Supreme Court of Alabama.

[2] The other defendants in the action are Holmes-Gilbrooke General Partners, H. Robert Holmes ("Holmes"), and Gilbrooke Associates, Inc. Holmes-Gilbrooke General Partners is the general partner of Gilford; Holmes and Gilbrooke Associates, Inc. are Holmes-Gilbrooke's general partners.

[3] Ala. Code § 8-6-4 (1984) makes it unlawful for any person to offer or sell any security in Alabama unless it is registered under the Alabama Securities Act or unless the security or sale is exempt from registration.

the other defendants filed a motion to dismiss the complaint, asserting lack of personal jurisdiction. (R. 9). The trial court thereafter granted respondents' motion for summary judgment – opposed by Gilford on the ground that its sale of the limited partnership interest to the Pizitz Partnership was exempt from registration under the Alabama Securities Act – and directed the entry of a final judgment pursuant to Ala. R. Civ. P. 54(b).[4] This order was affirmed on appeal to the Supreme Court of Alabama.

Although the first communication between the Pizitz Partnership and a representative of Gilford was initiated by Pizitz, Gilford voluntarily and purposefully engaged in conduct directed toward the State of Alabama in connection with the sale of the limited partnership interest at issue here. Specifically, Gilford mailed a number of documents to Pizitz at his office in Birmingham, Alabama, including a Confidential Private Placement Memorandum (which contained factual misrepresentations for which respondents sought relief in this action); newspaper articles concerning the investment activities and strategies of Holmes, one of Gilford's principals; a subscription agreement for execution in Alabama by the Pizitz Partnership; the fully executed subscription agreement; the Gilford limited partnership agreement; amendments to the Gilford limited partnership agreement; monthly updates of

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[4] By agreement of the parties, the trial court reserved ruling on respondents' motion for summary judgment with respect to defendants other than Gilford. (R. 292). Respondents' claims for fraud and breach of fiduciary duty also were left pending. (R. 303).

Gilford's performance; and statements of changes in the Pizitz Partnership's capital account in Gilford. (R. 37-39). In addition, Pizitz and Holmes spoke by telephone on several occasions before and after the Pizitz Partnership's investment in Gilford. Pizitz participated in each of these conversations from his office in Birmingham. (R. 38).[5]

Even more to the point, however, Gilford's voluntary and purposeful activities directed to the State of Alabama were part of a successful effort to sell an unregistered security to the Pizitz Partnership in violation of the Alabama Securities Act. Regardless of who made the first contact, Gilford could have declined to respond to Pizitz's initial inquiry or to furnish information to him, and certainly could have refused to finalize the sale. Its decision to sell the security to the Pizitz Partnership in violation of Alabama law was voluntary and intentional.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA UNDER ESTABLISHED PRINCIPLES OF THIS COURT

Gilford seeks a writ of certiorari on the issue of whether its sale of an unregistered security in Alabama in violation of state securities laws satisfied the "minimum

[5] The Petition fails to mention any of these contacts with the forum state.

contacts" requirement of Alabama's long-arm statute,[6] such that an action against Gilford to enforce the laws of Alabama properly could be maintained in an Alabama court. Gilford argues that it is not subject to personal jurisdiction in Alabama because (a) the mere execution of a contract in the forum state does not confer personal jurisdiction over a nonresident defendant, and (b) the agreement to sell the security at issue was in any event executed in Illinois, not Alabama, since it was subject to

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[6] Alabama's long-arm statute provides for out-of-state service to the extent permitted by the due process clause of the United States constitution:

> (a) *Basis for out-of-state service.*
>
> * * *
>
> (2) SUFFICIENT CONTACTS. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's:
>
> (A) Transacting any business in this state;
>
> * * *
>
> (C) Causing tortious injury or damage by an act or omission in this state. . . .
>
> * * *
>
> (I) Otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.

Ala. R. Civ. P. 4.2.

"acceptance" by Gilford in Illinois. Of course, the basis of personal jurisdiction in this case was not the mere execution of a contract, but rather the fact that Gilford voluntarily sold an unregistered security to Alabama residents – in short, that its contacts with the State of Alabama violated Alabama law, with foreseeable injury to residents of the state.

In *Calder v. Jones*, 465 U.S. 783 (1984), this Court adopted an "effects" test that allows the assertion of personal jurisdiction for a nonresident defendant's "intentional, and allegedly tortious, actions . . . expressly aimed at [the forum state]," made with knowledge that the injury will be felt by the plaintiff in the forum state. 465 U.S. at 789-90. The Court made a sharp distinction between such intentional torts and the "mere untargeted negligence," present in cases relying on the "stream of commerce" test for personal jurisdiction, 465 U.S. at 789, and concluded:

> An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

465 U.S. at 790. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court cited *Calder*, among other cases, for the following propositions:

> So long as a commercial actor's efforts are "purposely directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. . . .
>
> [Considerations of] "the burden on the defendant," "the forum State's interest in adjudicating

> the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies" . . . sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

471 U.S. at 476-77 (citations omitted).

In finding that Gilford's contacts with Alabama were sufficient to confer personal jurisdiction, the Alabama Supreme Court adopted the reasoning of *Florendo v. Pan Hemisphere Transp., Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976). Although *Florendo* predates *Calder*, it is based on precisely the same reasoning.

As in the present case, the *Florendo* court determined that nonresident defendants were subject to personal jurisdiction in Illinois for the sale of an unregistered security in that state. The court found it unnecessary to reach the issue of whether the defendants were "transacting business" in Illinois, holding instead that the failure to register the security under the Illinois securities statute was "[t]he commission of a tortious act [in Illinois]," within the meaning of an alternative provision of the long-arm statute. The court reasoned that (a) the definition of "tortious act" was not limited to "those acts which constituted torts at common law," but included duties imposed by statute, such as the duty to register securities imposed by state securities laws, 419 F. Supp. at 17-18;

and (b) the situs of the tort was Illinois because the injury occurred in Illinois, 419 F. Supp. at 18.

The *Florendo* court also concluded that requiring the defendants to litigate in Illinois would not violate due process – that is, that the "minimum contacts" requirement was met:

> One test of fairness is whether the possibility of being sued in the forum was foreseeable. . . .
>
> In this case, the possibility of being sued in Illinois was even more foreseeable than it was for the defendants in [various products liability cases applying the "stream of commerce" test for personal jurisdiction]. There the defendants merely released a product into nationwide channels of commerce and could contemplate that it might ultimately be bought by a purchaser in some other state. Here defendants sold an interest in a limited partnership to a specifically identified purchaser residing in Illinois.
>
> Another test of fairness is whether defendants invoked the benefits and protections of the laws of Illinois. Defendants availed themselves of the privilege of selling a security to an Illinois resident. It is certainly fair under the circumstances to require them to litigate a controversy concerning that sale in Illinois.

419 F. Supp. at 19.

Gilford argues that "[t]he theoretical foundation of *Florendo* has been clearly repudiated by this Court [because] [t]he *Florendo* court applied a version of the "stream of commerce" test which was decried by the Court in *Asahi Metal [Indus. Co. v. Superior Court*, 480 U.S.

102, 112 (1987).]" Gilford's reference, however, is to section II A of Justice O'Connor's opinion in *Asahi*, which five justices of the Court expressly refused to endorse. Moreover, the *Florendo* court did not rely on the "stream of commerce" test, but, like this Court in *Calder*, simply noted that the purposeful direction of a tort at a citizen of the forum state provides a stronger basis for personal jurisdiction than that found in "stream of commerce" cases. Consequently, not only the "theoretical foundation," but also the rationale of *Florendo* remains sound.

In addition to the factors considered in *Calder* and *Florendo*, Gilford had mail and telephone contacts with the Pizitz Partnership which were not "random," "fortuitous," or "attenuated." *Burger King, supra*, 471 U.S. at 475. As the Court stated in *Burger King*:

> Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State. . . . [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

471 U.S. at 476. Gilford's mail and phone contacts in this case were purposely designed to consummate the sale of an unregistered security in the State of Alabama for a price in excess of $500,000. Under *Burger King*, the Court also properly should consider Alabama's "manifest interest" not only in "providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," 471 U.S. at 473, but also in providing a forum for enforcement of its securities laws.

Finally, particularly in light of the amount at issue, the defense of this action in Alabama has imposed no undue burden on Gilford. No representative of Gilford was required to appear personally in the state in connection with discovery or any court proceeding. As the Court recognized in *Burger King*, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. . . . " 471 U.S. at 474 (citation omitted).

In essence, while conceding that Alabama validly may impose registration requirements governing the sale of securities to its citizens, Gilford argues that this Court should not permit enforcement of those requirements by Alabama courts. In a highly regulated field such as the sale of securities, an issuer such as Gilford not only should know that registration may be required, but also "should reasonably anticipate being haled into court," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), in any state in which it intentionally sells securities – whether by telephone, mail, or in person – without satisfying the state registration requirements. Because statutory securities regulation provisions and the states' efforts to enforce them through the exercise of long-arm jurisdiction are reasonably foreseeable, the "fair warning" requirement of due process plainly was met here. *Burger King, supra*, 471 U.S. at 472-74.

II.

GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA WITHOUT REGARD TO ANY STATUTORY "LEGAL FICTION"

Ignoring virtually all of the factors discussed in Part I of the Brief, Gilford insists that personal jurisdiction in this case was based solely on a "legal fiction." Gilford argues that because it mailed an unsigned subscription agreement to Pizitz in Alabama, reserving the right of final "approval" in Illinois, the sale of the limited partnership interest technically occurred in Illinois. Thus it argues that Ala. Code § 8-6-12 (1984), which defines where the offer and acceptance of a securities sale occur, creates a "legal fiction," which cannot serve as the basis for personal jurisdiction.

The Alabama Supreme Court unquestionably relied on Ala. Code § 8-6-12 (1984) in determining that the sale of the Gilford limited partnership interest occurred in Alabama. This determination was not, however, necessary to the personal jurisdiction analysis. The court's purpose in citing this section was to demonstrate that Gilford's conduct met one of the specific bases for personal jurisdiction set forth in Alabama's long-arm statute, that of "[c]ausing tortious injury or damage by an act or omission *in this state.*" Ala. R. Civ. P. 4.2(a)(2)(C) (emphasis supplied). Reliance on § 8-6-12 is not necessary to satisfy the more general "minimum contacts" provision for personal jurisdiction set forth in Ala. R. Civ. P. 4.2(a)(2)(I),[7] which "is as broad as the permissible limits

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[7] *See* n.6, *supra*.

of due process." *Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141, 145 (Ala. 1983). The due process requirement is satisfied, not by any "legal fiction" regarding where the sale occurred, but by Gilford's voluntary and purposeful sale of an unregistered security to Alabama residents in violation of Alabama securities laws.[8]

In any event, the question of where a contract technically is executed for conflict of laws purposes never is controlling in the determination of personal jurisdiction:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington*, [326 U.S. 310, 319 (1945)], or on "conceptualistic . . . theories of the place of contracting or of performance," *Hoopeston Canning Co. v. Cullen*, [318 U.S. 313, 316 (1943)].

Burger King, 471 U.S. at 478. Instead, the factors of "prior negotiations and contemplated future consequences,

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[8] Of course, Gilford might have argued that, but for the "legal fiction" established by Ala. Code § 8-6-12 (1984), the sale would not have been unlawful. Gilford challenged only Alabama's exercise of personal jurisdiction, however, not the validity – on constitutional or other grounds – of Alabama's imposition of liability for failure to register the limited partnership interest. Indeed, Gilford's defense to liability was premised solely on its argument that the interest was exempt from the registration requirements of the Alabama Securities Act. Consequently, the Court must assume that Gilford violated a valid statute designed to regulate securities trading with Alabama citizens.

along with the terms of the contract and the parties' actual course of dealing," are to be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. 471 U.S. 479. Accordingly, although a contract alone does not automatically establish personal jurisdiction, mail and telephone communications concerning the formation of the contract – communications that without question occurred here – can satisfy the minimum contacts requirement. *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993).

III.

THE DECISION OF THE ALABAMA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY UNITED STATES COURT OF APPEALS, OR ANY OTHER STATE COURT OF LAST RESORT

Of the cases cited by Gilford, only *Gordon v. Tow*, 498 N.E.2d 718 (Ill. App. Ct. 1986), addresses the issue of personal jurisdiction over a nonresident defendant based on the defendant's violation of the forum state's securities laws.[9] Gilford's description of *Gordon* and its suggestion that the decision conflicts with the lower court decisions in this case, however, simply are misleading. Gilford correctly observes that the *Gordon* court rejected the exercise of personal jurisdiction over a nonresident

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[9] Although Gilford's citation of *Gordon* is prefaced by "*See e.g.*," suggesting that it is one of several "other state court decisions addressing the same issue" with which the decision below "conflicts," Gilford fails to cite any other such decision.

defendant based on his unlawful sale of unregistered securities in Illinois. What Gilford fails to disclose, however, is that the sole issue in *Gordon* was whether the defendant was "transact[ing] business" in Illinois within the meaning of that state's long-arm statute.[10] Indeed, the *Gordon* court expressly declined to address whether the defendant's conduct might have satisfied the less stringent "minimum contacts" test of due process.[11] Of course, Ala. R. Civ. P. 4.2, unlike the Illinois long-arm statute, has a general "minimum contacts" provision making the statute "as broad as the permissible limits of due process." *Alabama Waterproofing*, 431 So. 2d at 145. Because it is not necessary for a defendant to "transact business" in Alabama to be subject to the jurisdiction of an Alabama court, and because the Alabama courts were not required to and did not conclude that Gilford had done so, Gilford's reliance on *Gordon* is unavailing.

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[10] The court did not consider the provision of the Illinois statute authorizing jurisdiction over nonresident defendants who cause "tortious injury" within the state, which provision was the basis for the holding in *Florendo, supra*.

[11] The court stated:

> [W]e reject the contention that the sole focus is whether Tow had sufficient "minimum contacts" with Illinois so as to comport with the Fourteenth Amendment's due process limitations on a State's jurisdiction over a nonresident defendant. . . .
>
> The Illinois Supreme Court has stated that the "boundaries or limits under our [long-arm] statute are not to be equated with the 'minimum contacts' test under the due process clause."

498 N.E.2d at 721 (citations omitted).

Other than *Gordon*, the only state or federal circuit court cases on which Gilford relies are breach of contract actions. *Sea Lift, Inc. v. Refinadora Costarricense*, 792 F.2d 989 (11th Cir. 1986); *Erlanger Mill v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956).[12] The "effects" test adopted by this Court in *Calder* of course was not applicable in those cases. Moreover, the dicta in *Erlanger* on which Gilford relies, to the effect that personal jurisdiction in tort and contract cases is decided on the same standards, is contrary to *Calder*.[13]

By relying on breach of contract cases, Gilford simply attempts to obscure the basis of the claims asserted against it: (a) that Gilford sold securities to the Pizitz Partnership in Alabama in violation of Alabama law, and (b) that its written communications directed to Alabama residents were alleged to contain false representations of material fact. If respondents were claiming that Gilford breached a contract to be performed in Illinois, Gilford might not be held to have foreseen the possibility of being sued in Alabama based on its written and oral communications with Pizitz. Gilford reasonably should

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[12] Although *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123 (3rd Cir. 1976), also is cited, Gilford relies on a concurring opinion, not the opinion of the court.

[13] Although *Erlanger* has not expressly been overruled, the Fourth Circuit subsequently has recognized that *Calder* "did away with any uncertainty about minimum contacts on a tort theory." *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 528 n.8 (4th Cir. 1987). Indeed, because the jurisdictional principles that control this case have been settled for some time, it is hardly surprising that Gilford's search for a "conflicting" circuit court case yielded only a decision that predates *Calder* by nearly forty years.

have foreseen, however, that it might be sued in Alabama for misrepresentation or for violation of Alabama securities laws, with injury to Alabama residents.

CONCLUSION

The Petition does not present this Court with any significant conflict between the circuits or state courts of last resort, with fundamental error below, or with any other compelling reason to grant the writ. Consequently, the Petition is due to be denied.

Respectfully submitted this 20th day of May, 1994.

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(3)

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

GILFORD PARTNERS,
Petitioner,

vs.

RICHARD PIZITZ et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents fail to address the merits of the issue raised in the petition for a writ of certiorari filed by Gilford Partners — whether personal jurisdiction properly can be based upon a legal fiction created by the forum asserting that jurisdiction. The respondents argue instead that the Alabama courts properly asserted jurisdiction over Gilford for reasons not stated in the opinion of the Supreme Court of Alabama. The writ is due to be granted because the decision below, by predicating jurisdiction on a fiction manufactured by the forum,

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*The Certificate of Interested Parties submitted with the Petition remains unchanged.

contravenes the Due Process Clause and this Court's precedents. The respondent has offered no justification for an extension of the long-arm reach of Alabama based on this fiction. Moreover, and contrary to the respondents' assertion, the record in this case affirmatively establishes that no other basis to assert jurisdiction over Gilford Partners exists.

i.

The Supreme Court of Alabama asserted jurisdiction over Gilford Partners based exclusively on a statutory fiction. That court concluded that jurisdiction was proper because Gilford Partners potentially committed tortious injury by acts or omissions "in this state" only because the Alabama securities provisions "deemed" the sale of the security to occur in Alabama.

The respondents' refusal to address the issue raised by the petition is conspicuous. The Supreme Court of Alabama thought the issue important enough to address and attempted, albeit unsuccessfully, to explain away the fiction. (*See* Appendix A to the Petition at A-4.) Somewhat surprisingly, the respondents do not try to defend the analysis of the Supreme Court of Alabama. Nor do the respondents offer any alternative analysis justifying the use of a legal fiction as a means to achieve personal jurisdiction over non-residents within the limits of the Due Process Clause.

Instead, the respondents suggest to this Court that the Alabama courts asserted jurisdiction over Gilford Partners based upon "Gilford's voluntary and purposeful activities directed to the State of Alabama. . . . " (Brief in Opposition at 3.) The Supreme Court of Alabama did not base jurisdiction on the contacts adverted to in the respondents' brief. The court's opinion contains no analysis of any of these purported contacts, because the

Alabama court based jurisdiction exclusively on the statutory fiction.[1]

There is no constitutional justification for the assertion of personal jurisdiction based on the fictional situs of the sale of a security under Alabama law. Because the Alabama court's holding violates due process, the writ should issue.

ii.

The respondents' suggestion that the Alabama court could have found that jurisdiction exists independently of the legal fiction demonstrably fails.[2] The respondents would predicate jurisdiction over Gilford Partners solely on correspondence and telephone contacts between the parties.[3] The respondents' assertion overlooks the affirmative evidence in the record that establishes beyond

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[1] The respondents' footnote 5 (indicating that the petition did not mention the correspondence or telephone contacts between the parties) is misplaced. The Supreme Court of Alabama based jurisdiction solely and exclusively on the fictional situs of the sale of the security — the issue raised in the petition for a writ of certiorari. That court never addressed the bases for jurisdiction asserted by the respondents in their brief to this Court. Nevertheless, as we demonstrate later in this reply, the contacts suggested by the respondents are insufficient bases to assert jurisdiction over Gilford Partners.

[2] In their Brief in Opposition (at 2-3), the respondents refer to claims of misrepresentation and fraud. However, the assertion of those claims does not bolster their jurisdictional argument. The claims were voluntarily dismissed at the trial court level. (C.R. 303.) Moreover, the respondents made no evidentiary showing before the trial court that jurisdiction properly could be asserted over Gilford based upon such claims, and the Supreme Court of Alabama never considered them.

[3] Telephone and correspondence contacts alone ordinarily have been held to be an insufficient predicate to support an assertion of jurisdiction. *See e.g., Charia v. Cigarette Racing Team, Inc.*, 583 F.2d

dispute that the *only* contacts between Gilford Partners and Alabama resulted from the unilateral activity of the Pizitzes. Respondent Richard Pizitz initiated the *first* contact with Gilford,[4] and *all subsequent contacts.* Other than routine periodic financial statements, all communications (including all correspondence and telephone contact) from Gilford Partners to the Pizitzes were in specific *response to a request by Richard Pizitz.*[5] (Pizitz Dep. p. 84-85, 113; Holmes Affd. ¶¶ 6, 7. (C.R. 20.)). It is undisputed that Gilford Partners never solicited any business in Alabama and has had absolutely no contact with this state apart from its response to the Pizitz overtures.

In this case the Pizitz partnership, which included partners from Alabama, California and Alaska, reached out to another state, Illinois, applied to Illinois to purchase an investment in a fund located there and sent a notice to Illinois to cancel the investment. Gilford Part-

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184, 187-88 (5th Cir. 1978); *Benjamin v. Western Boat Building Corporation*, 472 F.2d 723, 728-30 (5th Cir. 1973) and *General Elec. Credit v. Scott's Furniture Warehouse*, 699 F. Supp. 907, 912-913 (N.D. Ga. 1988).

[4] The respondents admit as much in their Brief in Opposition at 2.

[5] Mr. Pizitz testified that specific documents referred to by the respondents in their brief in opposition (at 2-3) were sent to him on his request. Those documents included the private placement memorandum, (Dep. p. 87), the agreement of limited partnership (Dep. p. 52), and the news clippings (Dep. p. 55). No documents, apart from the periodic statements, were sent to Pizitz without his first requesting them. (Dep. p. 86.) The respondents include no record citation for their statement that "Gilford's mail and phone contacts in this case were purposely designed to consummate the sale of an unregistered security in the State of Alabama. . . . " (Brief in Opposition at 8) because the statement is simply without any support in the record. However, Gilford's position that the respondents initiated all contact is amply supported by testimony from both parties.

ners' conduct was not directed toward Alabama. Rather, the petitioner only responded to the requests of the Pizitzes. Gilford Partners' passive acceptance of the Pizitz partnership's initiatives is precisely the type of conduct described by this Court as insufficient to support jurisdiction.[6]

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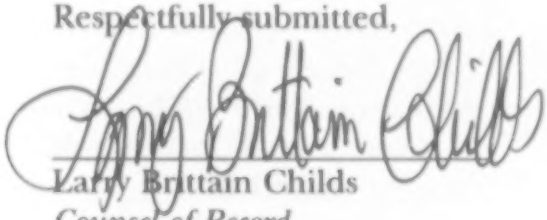
[6]This Court has underscored, in substance and in style, that the actions which support jurisdiction are those of the *defendant* — not of the plaintiff or the forum itself. Jurisdiction is properly asserted if the contacts "result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 109, 107 S.Ct. 1026, 1030, 94 L.Ed.2d 92 (1987) (emphasis in original). This substantial connection between the defendant and the forum state "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032 (emphasis in original). *See also, Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

CONCLUSION

The respondents' attempts to redirect the attention of the Court from the ruling of the Supreme Court of Alabama notwithstanding, the petition for a writ of certiorari is due to be granted. The decision below expands the jurisdiction of a single state beyond the proper bounds of Due Process. This Court should return uniformity to jurisdiction determinations by granting review and reversing the decision below.

Respectfully submitted,



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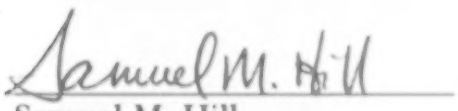

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